Solving Statute of Limitations Problems Under the Fair Credit Reporting Act

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In 1981, Mr. Smith decided to buy a house and proceeded to seek a loan for the purchase. Upon submitting a loan application to the home loan division of his bank, Mr. Smith's credit was investigated by a bank loan officer—a routine procedure in such transactions. However, Mr. Smith's application was rejected. When Mr. Smith obtained a copy of his credit report, he discovered an error that had affected his credit rating and had caused the bank to reject his loan application. He informed the credit agency of the problem and was told that the error would be erased from the agency's computer record. In 1982, Mr. Smith decided to buy a car. Again, his application for a loan was refused on the basis of the same erroneous credit report. Smith contacted the agency again and was assured that the error would be erased. More than two years later, in 1985, Mr. Smith applied for a credit card. When his application was refused because of the same uncorrected error, Mr. Smith filed for relief in federal court, claiming that the credit reporting agency had violated the provisions of the Fair Credit Reporting Act (FCRA).[1]

The FCRA requires that credit reporting agencies adopt "reasonable procedures"[2] to ensure the "confidentiality, accuracy, relevancy, and proper utilization"[3] of the information which they gather and provide to

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[1]Fair Credit Reporting Act § 601, 15 U.S.C. § 1681 (1982) [hereinafter cited as FCRA]. This Act is an amendment to the Consumer Credit Protection Act, 15 U.S.C. § 1601 (1982). For a general review of the FCRA see Annot., 17 A.L.R. Fed. 675 (1973). *See also* Kaswell & Sullivan, *Credit Reporting and Collection Practices*, 38 Bus. Law. 1371 (1983).

[2]15 U.S.C. §1681b. Section 1681e explains that a credit bureau discharges its obligation to maintain reasonable procedures by making certain that reports are accurate and by divulging the contents of a subject's file only upon a proper request. 15 U.S.C. § 1681e. *See* Note, *Protecting the Subjects of Credit Reports*, 80 Yale L.J. 1035, 1066-67 (1971). Judicial definitions of "reasonable procedures" are discussed *infra* at notes 26-30.

According to one commentator, "[This] agreement stands for the proposition that whenever credit bureaus reasonably should know of systematic errors in their reporting systems, then they must evaluate and implement system adjustments that could reduce the inaccuracies in a cost-effective manner." Fortney, *Consumer Credit Compliance and the Federal Trade Commission: Sketching the New Directions*, 39 Bus. Law. 1305, 1313 (1984) (footnote omitted). "[This calling] for incremental increases in the accuracy of the credit information system" takes account of the fact that one hundred percent accuracy is probably unattainable at any cost. *Id.*

[3]15 U.S.C. §1681b. *See, e.g.*, Heath v. Credit Bureau of Sheridan, Inc., 618 F. 2d 693 (10th Cir. 1980) (plaintiff properly stated a claim against the credit agency for transmitting a credit report for an impermissible purpose).

potential lenders.[4] The FCRA also provides for a two-year statute of limitations for suits arising from negligent error in credit reports.[5] Unfortunately, however, the section outlining the time limitations is poorly drafted. As a result, the statute of limitations found in the FCRA creates a problem for those attempting to interpret it.[6] For example, in Smith's case, the inaccurate report raises a question regarding the agency's procedures,[7] and Mr. Smith's claim for the 1985 incident appears to be well-founded. But whether Mr. Smith can sue the agency for losses he previously incurred as a result of the identical error appearing in the 1981 and 1982 reports is a question of first impression the courts have yet to answer.

This Article addresses two related questions posed by Mr. Smith's FCRA claim: (1) when does the two-year statute of limitations for negligent error begin to run;[8] and, (2) can consumers recover for a "continuing error,"[9] one which began outside the two-year period, but persisted within two years of the suit?[10] The statute is ambiguous.

Recent cases illuminate the first question, but do not set out a formula that can be used by trial courts confronted with the issue. The second question of "continuing error" has been raised by parties to FCRA suits,[11] but never directly addressed by the courts. This Article argues that both questions can be answered with reference to the law

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[4]The FCRA governs two types of consumer reports: investigative consumer reports and economic consumer reports. An investigative report, which might be requested by a potential employer or insurance company, includes personal or subjective information on a person's character and general reputation. Such information is often gathered through personal interviews with friends or associates of the consumer. 15 U.S.C. § 1681a(e). An economic report contains information bearing more directly on an individual's credit worthiness, i.e., a credit history. 15 U.S.C. § 1681a(d). For a general discussion of both types of reports, see Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 Geo. L.J. 509 (1969); Note, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 47 Notre Dame Law. 1291, 1292-95 (1972).

[5]15 U.S.C. § 1681p. *See infra* text accompanying note 20. For analysis and discussion of FCRA provisions, see generally Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 Colum. L. Rev. 458 (1976) [hereinafter cited as *Judicial Construction*]; Note, *The Fair Credit Reporting Act*, 56 Minn. L. Rev. 819 (1972); Comment, *The Impact of the Fair Credit Reporting Act*, 50 N.C.L. Rev. 852 (1972).

[6]*See* 15 U.S.C. § 1681p.

[7]*See* Bryant v. TRW, Inc., 487 F. Supp. 1234, 1240, 1242 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982) (once report is found to be inaccurate in fact, jury must determine whether consumer reporting agency followed reasonable procedures to ensure reasonable accuracy). *See also* Hauser v. Equifax, Inc., 602 F.2d 811, 814-15 (8th Cir. 1979) (the inaccuracy itself is not a touchstone).

[8]*See infra* notes 24-59 and accompanying text.

[9]A "continuing error," like a continuing violation, is an error which gives present effect to a past negligent act—the unreasonable credit agency procedure. *See, e.g.*, United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

[10]*See infra* notes 59-82 and accompanying text.

[11]Lawhorn v. Trans Union Credit Information Corp., 515 F. Supp. 19 (E.D. Mo. 1981).

of defamation, which underlies the FCRA legislation, tempered by recognition of the FCRA's consumer-oriented purpose.

I. The Statute

In 1970, Congress attempted to curb the growing power of credit reporting agencies with passage of the FCRA. The stated purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . ."[12]

The statute imposes significant responsibilities on credit reporting agencies. Among other things, the FCRA limits the uses for which a consumer credit report can be released,[13] and provides a flow chart for challenging a report's accuracy.[14] If a consumer challenges any information contained in his file, the agency must reinvestigate.[15] If the information is confirmed upon reinvestigation, the consumer may file a statement of the dispute, and any disputed information will be noted as such in forthcoming reports.[16] Furthermore, the agency is to inform the consumer of any information deleted from his report.[17] As a general matter, the FCRA requires that a credit reporting agency maintain "reasonable procedures," and exert a "reasonable effort" in reporting and verifying consumer information.[18] An agency which fails to conform to these standards is exposed to civil liability.

Federal jurisdiction is granted in section 1681p of the FCRA.[19] That section also sets out the applicable statute of limitations for actions brought in federal court. Suits may be brought:

> . . . within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.[20]

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[12] 15 U.S.C. §1681b (1982).

[13] *Id.* at § 1681b.

[14] *Id.* at § 1681i. *See* Stewart v. Credit Bureau Inc., 734 F.2d 47, 49 n.2 (D.C. Cir. 1984).

[15] 15 U.S.C. § 1681i(a) (1982).

[16] *Id.* at § 1681i(b)-(c).

[17] *Id.* at § 1681i(d).

[18] *Id.* at §1681b & § 1681e.

[19] *Id.* at § 1681p. Civil liability for willful and negligent noncompliance with the FCRA arises under sections 1681n and 1681o, respectively.

[20] *Id.* at § 1681n, § 1681o, § 1681p.

The FCRA explicitly states that this grant of federal jurisdiction does not preclude the effect of state law.[21] To date, fourteen states have enacted laws which regulate consumer reporting agencies.[22] Under certain circumstances, an FCRA claim may also be joined with the common law claims of negligence, invasion of privacy, and commercial defamation, which are somewhat limited by the FCRA.[23]

II. When Does the Two-Year Statute of Limitations Begin to Run?

The FCRA's limitations provision contemplates two possible dates for triggering the statute of limitations — either "two years from the date on which the liability arises" if the actionable error was negligent, or "within two years after discovery by the individual of the [material] misrepresentation" if the information was "materially and willfully" withheld.[24]

The latter rule for willful misrepresentation is considered a "discovery" rule, and thus poses a threshold question of fact whenever the

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[21]*Id.* at § 1681t. The statute reads:

> This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

Id. See Leonard & Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary?* 35 Bus. Law. 1291 (1980).

[22]State credit reporting laws are discussed in Annot., 12 A.L.R. 4th 294 (1982). *See also* Leonard & Tidwell, *supra* note 21, at 1295-1309 (concerning the problems created by dual legislation); Comment, *The New Commercial Speech and the Fair Credit Reporting Act,* 130 U. Pa. L. Rev. 131, 133 n.10 (1981) (listing several states which regulate consumer credit reporting).

[23]15 U.S.C. § 1681h(e) (1982). The statute reads:

> . . . no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy or negligence with respect to the reporting of information against any consumer reporting agency (or) any user of information . . . based on information disclosed pursuant (to the Act) except as to false information furnished with malice or willful intent to injure such consumer.

Id.

Section 1681h(e), however, limits state law negligence, privacy, and defamation actions based on reports disclosed under the FCRA to instances where false information is furnished with malice or willful intent to injure the consumer. 15 U.S.C. § 1681h(e). *See* Thorton v. Equifax, Inc., 619 F.2d 700 (8th Cir. 1980); Peller v. Retail Credit Co., 359 F. Supp. 1235 (N.D. Ga. 1973). The section does not apply when the consumer has not requested information through the FCRA. Two scholars nevertheless assert that "the Act effectively bars state actions in defamation and substitutes a statutory negligence action." Blair & Maurer, *Statute Law and Common Law*, 49 Mo. L. Rev. 289, 306 (1984). *See also* Note, *supra* note 2, at 1068 (§ 1681h(e) interferes with common law remedies). *See generally* Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95 (1983).

[24]15 U.S.C. § 1681p. *See* Conf. Rep. No. 1587, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. Code Cong. & Ad. News 4411, 4416.

statute of limitations defense is raised. That is, when did discovery occur? Such a rule is no more problematic in the FCRA context than in the common law of tort,[25] for discovery is essentially a clear factual issue. The real problem for the FCRA plaintiff is bringing suit within the time provided by the first statute of limitations, which is triggered by the act of negligence.

Liability for negligence arises upon the credit agency's use of "unreasonable procedures," but from a consumer's perspective, unreasonable procedures can be virtually impossible to prove. An inaccurate report, for example, is not a *per se* violation of the Act.[26] In order to show negligence, the consumer must not only prove the inaccuracy of the report, but also that the error resulted from the agency's inadequate procedures.[27] Furthermore, procedures resulting in error are not necessarily inadequate.[28] Instead, "[t]he standard of conduct by which the trier of fact must judge the adequacy of agency procedures is what a reasonably prudent person would do under the circumstances."[29] A credit reporting agency must simply follow "reasonable procedures to assure maximum *possible* accuracy of the information concerning the individual about whom the information relates."[30]

Given the difficulty of determining when liability for negligence arises, it becomes even more important to determine what date triggers the FCRA limitations period. According to the wording of the statute, the two-year period arguably runs from (1) the date of "actual unreasonableness" by the agency, (2) issuance of an erroneous report, (3) the date of whatever event might trigger the limitations period under state law, or (4) receipt of the credit agency's report.[31]

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[25]*See* RESTATEMENT (SECOND) OF TORTS § 899 comment e (1977).

[26]Bryant v. TRW, Inc., 487 F. Supp. 1234 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72, 78 (6th Cir. 1982); Hauser v. Equifax, Inc., 602 F.2d 811, 814-15 (8th Cir. 1979). *See* Note, *Fair Credit Reporting*, 55 N.Y.U.L. REV. 111 (1980).

[27]*See* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 41-42 (D.C. Cir. 1984).

[28]In fact, Blair & Maurer assert that "agencies produce a set level of negative information as a structural feature of their service, even though that tends to increase the incidence of false negative reports." Blair & Maurer *supra* note 23, at 294-95. They believe that this occurs in response to market pressure from the users of reports who wish to avoid false positive information, i.e., false information which understates the risk of making a loan. Nevertheless, the District of Columbia Circuit Court recently held that "[i]n certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures, and we hold that in such instances plaintiff's failure to present direct evidence will not be fatal to his claim." Stewart v. Credit Bureau, Inc., 734 F.2d 47, 52 (D.C. Cir. 1984).

[29]Thompson v. San Antonio Retail Merchant Ass'n, 682 F.2d 509, 513 (5th Cir. 1982), *quoted in* Bryant v. TRW, 689 F.2d 72, 78 (6th Cir. 1982).

[30]15 U.S.C. § 1681e(b) (1982)(emphasis added). *See also* 689 F.2d at 78.

[31]A fifth possibility — that discovery of the negligent error might trigger the time period — is excluded, because section 1681p does explicitly set out a discovery rule for willful acts. 15 U.S.C. § 1681p (1982). Some other occurrence must trigger the limitations period for negligent violations of the FCRA.

The first possibility, an actual unreasonableness test, would link liability to the unreasonable practices of the agency, regardless of the date of discovery or damage to the consumer. A slight modification of this approach was considered and rejected by a federal district court in *Lawhorn v. Trans Union Credit Information Corp.*[32] There, the plantiff complained of a series of violations which occurred more than three years prior to the time the suit was filed. Noting that the action had to be brought within two years from the date on which liability arose, the plaintiff argued that "liability allegedly arises from [the] defendant's system of reporting itself, rather than from individual instances of inaccurate information reported about plaintiff."[33] In essence, the plaintiff argued that the system of reporting employed by defendant constituted the "actual unreasonableness" of the agency, or the violation of the FCRA. The court disagreed, finding that liability only arose when the defendant failed to comply with the statute, and that the obligations imposed by the statute were "only in the context of the preparation of a consumer report."[34]

Thus, the court concluded, the preparation of an erroneous or incomplete consumer report was a prerequisite to an agency's liability under the FCRA and that the date the statute of limitations begins to run is the date a report is issued, *not* the date the agency actually employs any unreasonable procedures.[35] If the unreasonable system of reporting or procedures had been the test, a plaintiff's actionable claim might begin and lapse without her knowledge.[36] Moreover, because the actual unreasonableness test would trigger questions regarding both the statute of limitations and the defendant's liability, the proposed test would mandate a hearing on the merits of plaintiff's claim each time a statute of limitations defense was asserted. Arguably then, the *Lawhorn* court rejected the actual unreasonableness test on grounds of fairness and practicality.

It appears that the *Lawhorn* court employed the second possible test—issuance of an erroneous credit report. After noting that the FCRA imposes "obligations only in the context of the preparation of a consumer report,"[37] the court relied on the unpublished opinion of *Kaufman v. Trans Union Systems Corp.*[38] to rule that "the date of the report would signal the beginning of the running of the statute of limitations."[39] The

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[32]515 F. Supp. 19 (E.D. Mo. 1981)(mem.).

[33]*Id.* at 20.

[34]*Id.* (emphasis added).

[35]*Id.* (quoting Kaufman v. Trans Union Sys. Corp., No. 80-1218C(3), slip op. at 4 (E.D. Mo. 1981)).

[36]In this case plaintiff had alleged a continuing violation by the defendent and thus sought to recover for violations allegedly occurring outside of the two-year limitations period.

[37]515 F. Supp. at 20.

[38]No. 80-1218C(3), slip op. (E.D. Mo. 1981).

[39]515 F. Supp. at 20 (quoting Kaufman, slip op. at 4).

opinion presents no more than a bare conclusion, but the conclusion could be supported by factors which the *Lawhorn* court failed to identify. For example, the date a credit report is issued is easily ascertainable and thus has at least some relevance to the plaintiff's damages. This approach also comports with the remedial purpose of the FCRA in that it does not foreclose a party's rights before he or she has had an opportunity to detect a violation, because at the time of issuance, any error or negligence is at least susceptible of discovery.

A closer examination reveals that another explanation for the *Lawhorn* decision can be drawn from the circumstances. It appears the *Lawhorn* court may not have actually adopted the issuance test. Rather, the court could just as easily have been relying on the third approach enunciated above—using the event that triggers the statute of limitations under state law. Under Missouri law, for example, the applicable statute of limitations for libel begins to run upon issuance of the defamatory statement.[40]

A state-by-state approach, however, could have chaotic results. In *Wilson v. Retail Credit Co.*,[41] for example, the Fifth Circuit Court of Appeals considered an action for libel arising from information in a Mississippi credit report. A one-year statute of limitations governs libel suits in Mississippi. The plaintiff filed suit on November 25, 1969, for a credit report issued in September, 1963. Relying on Mississippi libel law, the court stated that "[i]f any claim arose or accrued on this report, it did so when the report was received by defendant's customer . . . ."[42] The plaintiff's suit was barred, as the report had been received many years before.

The claim brought before the *Wilson* court was for libel and resulted from the allegedly defamatory content of the credit report. If the plaintiff had sued for an invasion of privacy, the limitations period might have differed. If courts apply state law, each FCRA suit in every state will be governed by a different statute of limitations, depending on the underlying common law claim and the individual state's applicable limitations period.

This result is in conflict with the federal statutory scheme, for the FCRA provides its own statute of limitations period[43] and anticipates that all FCRA claims will be governed by its provision. Arguably, Congress intended to consolidate those suits which arise from credit reports, regardless of the underlying claim, and provide consumers with the right to sue under the FCRA in addition to pursuing any state law

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[40]White v. Fawcett Publications, 324 F. Supp. 403, 404-05 (W.D. Mo. 1971). *See also* Mo. Ann. Stat. § 516.140 (Vernon Supp. 1985). Often in states where the statute of limitations is triggered by receipt of the libelous or defamatory material, the receipt test has been utilized by federal courts. *See, e.g.*, Wilson v. Retail Credit Co., 438 F.2d 1043, 1045 (5th Cir. 1971) (Relying on Mississippi law, the court held that the statue of limitations did not begin to run until the credit report was received by the consumer.).

[41]438 F.2d 1043 (1971).

[42]*Id.* at 1045.

[43]15 U.S.C. § 1681p.

claims.[44] The fact that publication or receipt is the law in the forum state should not be determinative of the federal claim. As section 1681t intimates, the FCRA does not duplicate or preempt state law, but rather provides an alternative method of regulation and enforcement.[45]

If state law is not determinative, the problem of what event should trigger the FCRA's statute of limitations remains. The common law of commercial defamation, an analogue of the FCRA,[46] is a persuasive source of rules to fill the gaps in the ill-designed federal statute. Such an analogy suggests that the fourth interpretation enumerated above—receipt of the credit report—should trigger the FCRA limitations period.

In general, defamation is the publication of anything injurious to the good name or reputation of another, or which tends to bring him into disrepute.[47] In a typical defamation suit, the statute of limitations runs from the time of publication.[48] Before publication, the defamation is not complete because the matter has not been made public or been disseminated in some way.

Given this analogy, a credit report is not complete until it is published and disseminated to a lending institution.[49] Information stored on computer software does not constitute a report until someone asks for a readout, for the contents of the report will not be discovered absent some communication. Therefore, damages do not arise until the report is communicated to a potential lender, affecting the borrower's finances, reputation, or peace of mind.

Congressional debates surrounding the FCRA emphasize the link between adverse publication and harm to consumers. Representative Sullivan, the House sponsor of the bill, expressly considered in her remarks to Congress that the FCRA would provide a federal remedy for commercial defamation. "The loss of a credit card can, of course, be expensive, but, as Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed. This bill's Title VI deals with

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[44] *Id.* at § 1681t.

[45] *Id. See generally* Blair & Maurer, *supra* note 23 at 301-06.

[46] *See* Maurer, *supra* note 23, at 97. Often, both common law defamation and violation of the FCRA are combined in one suit. In Wright v. TRW Credit Data, 588 F. Supp. 112 (S.D. Fla. 1984), the plaintiff charged that "as a result of the credit bureaus' poor reports the plaintiff has been defamed . . . ." *Id.* at 113. *But cf.* Note, *supra* note 2, at 1035 ("attempts to gain judicial relief [from credit reports] have been stymied by an inappropriate application of the defamation doctrine").

[47] *See* Black's Law Dictionary 375-76 (5th ed. 1979). *See generally*, Note, *supra* note 2 at 1049-54.

[48] *See* Lashlee v. Sumner, 570 F.2d 107, 109 (6th Cir. 1978); New York Times Co. v. Conner, 291 F.2d 492, 494 (5th Cir. 1961); Annot., 42 A.L.R. 3d 807 (1972). (There is no controversy at all that the statute of limitations commences to run from the time of publication of a libel.)

[49] *See* Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984). The court found that "these provisions [of the FCRA] allow consumers to bring suit for a violation of section 1681e(b) only if a credit reporting agency issues an inaccurate report on the consumer, since only then does harm flow from the agency's violation." *Id.* at 39 (footnote omitted).

that problem."[50] Representative Wylie of Ohio added that "many people who are [harmed by credit reporting errors] are unaware of the fact that misinformation in a credit report has harmed them."[51] The reported debates indicate that Congressional supporters of the FCRA were aware of, and concerned with, the *actual circulation* of harmful credit information.[52]

"[T]ime limitations . . . themselves promote important interests . . . ."[53] According to the United States Supreme Court, "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[54] In the consumer-oriented FCRA context, the interest in protecting valid claims, and thereby checking the power of credit agencies, is great.[55] The receipt test maximizes the number of claims which fall within the language of the FCRA limitations provision without significantly increasing the danger of stale claims. In addition, this approach draws support from the legislative record[56] and the commercial defamation analogy earlier drawn,[57] which stipulates that publication is complete upon receipt of the credit report. The cause of action should therefore

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[50]116 Cong. Rec. 36,570 (1970). The court in Partida v. Warren Buick, Inc., 454 F. Supp. 1366 (N.D. Ill. 1978), reached a similar conclusion when considering the statute of limitations governing a closed end credit transaction. In a case arising under the Trust in Lending Act, 15 U.S.C. §§ 1601-64, 1661-65, the court ruled that the limitations period ran from the date defendant violated the Act's disclosure requirements rather than the date that the credit contract was consummated. *Id.* at 1370-71. *See also* Davis v. Edgemere Finance Co., 523 F. Supp. 1121, 1123 (D. Md. 1981). A closed end credit plan is one where the full amount of indebtedness is set at the time of contracting. *Partida*, 454 F. Supp. at 1370 n.3. An open end credit plan has been defined as

> [o]ne in which credit terms are initially established with the opening of the account, but no fixed amount of debt is incurred at the time. Purchases made from time to time are added to the outstanding balance in the account and each new purchase represents an additional extension of credit under the terms as originally defined in the credit agreement.

Goldman v. First National Bank, 532 F.2d 10, 17 n.11 (7th Cir. 1976), *quoted in Partida*, 454 F. Supp. at 1370 n.3.

[51]116 Cong. Rec. 36,574 (1970).

[52]116 Cong. Rec. 35,575-76 (1970).

[53]Delaware State College v. Ricks, 449 U.S. 250, 259 (1980).

[54]Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975), *quoted in* Delaware State College v. Ricks, 449 U.S. at 259-60 (an employment discrimination case).

[55]Blair and Maurer argue that in the courts, the respective interests of consumers and the credit industry are asymmetric and that over time "the rules will develop so as to favor the industry, the party with the ongoing interest." Blair & Maurer, *supra* note 23, at 306. They further conclude that the requirements of the FCRA have constrained industry attempts to return to the inefficient common law standards which protected credit agencies from liability through the doctrine of "qualified privilege." *Id.* at 306-08. *See infra* note 79 (qualified privilege defined).

[56]*See supra* notes 50-52.

[57]*See supra* notes 47-50 and accompanying text.

accrue, and the statute of limitations begin to run, the moment the potential lender receives the credit agency report.[58]

III. Can Consumers Recover from a Continuing Violation?

Mr. Smith's problem is not entirely resolved by the adoption of the receipt test. Smith's lenders received his credit report in 1981, 1982, and 1984. The suit was filed in 1985. The 1984 incident is well within the limitations period, but claims on the earlier reports appear to be barred.

Suppose, however, that Mr. Smith argues that the error appearing in the 1984 report was a continuing error which originated in 1981. In some instances, courts have allowed recovery for actionable failures occurring outside the applicable limitations period if there is continuity between the past and present illegal acts.[59] When a continuing violation is established, the filing period would be measured from the date of the last violation, not the first.[60]

The FCRA is itself silent on the applicability of a continuing violation theory to FCRA suits. In the only reported opinion to consider the issue in the FCRA context, the court found that the continuing violation theory was not applicable.[61] In *Lawhorn v. Trans Union Credit Information Corp.*,[62] the court was asked to determine when the date of liability arose for the purposes of the statute of limitation.[63] The court rejected the plaintiff's argument that the liability arose as a result of defendant's system, and determined (arguably) that liability arises upon the publication of an erroneous report. However, the *Lawhorn* court construed (and then rejected) the plaintiff's contention as a continuing violation argument. The plaintiff, rather, was simply arguing that liability arose as the result of a defective system, not any individual actions. Thus, the question of continuing violation when the error is identical year after year remains open.

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[58]According to the Restatement (Second) of Torts, "[a] cause of action for misrepresentation in a business transaction is complete when the injured person has been deprived of his property or otherwise has suffered pecuniary loss or has incurred liability as a result of the misrepresentation." Restatement (Second) of Torts § 899 comment c (1979). Placed in the context of credit reports, this should be when the potential lender receives the inaccurate credit report. The FCRA, on the other hand, provides that the cause of action accrues at the time "liability arises," 15 U.S.C. § 1681p, and that liability arises when the agency employs unreasonable procedures. *See* 15 U.S.C. § 1681o.

[59]*See* Shehadeh v. Chesapeake & Potomac Tel. 595 F.2d 711, 724 (D.C. Cir. 1978). When "the ongoing program of discrimination, rather than any of its particular manifestations, . . . is the subject of attack, a complaint may be timely filed, even if acts occurring outside the limits are included. Rinkel v. Associated Pipeline Contractors, 17 F.E.P. 224 (D.C. Alaska 1978) (each discriminatory paycheck renews statute of limitations).

[60]Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d at 724 (footnote omitted).

[61]Lawhorn v. Trans Union Credit Information Corp., 515 F. Supp. 19, 20 (E.D. Mo. 1981).

[62]515 F. Supp. 19.

[63]*See* text accompanying notes 32-36.

At least one court has seemingly recognized a continuing violation theory. In *Polin v. Dun & Bradstreet, Inc.*,[64] a credit reporting suit alleging violations of the FCRA by a state credit regulatory scheme, the Tenth Circuit Court of Appeals recognized that the "defendant's conduct was . . . continuing in its nature and character. Hence, the damages flowing from the defendant's conduct would, under such a theory, not fully accrue until the final publication."[65] In *Polin*, misleading information was published initially and then republished on two later occasions. The court of appeals, in remanding the case, indicated that the lower court should not wholly disregard the first two publications.[66]

The continuing violations theory is not the norm in tort law, which generally limits the recovery period as a matter of fairness to potential defendants. A form of the theory is, however, a minority position in the common law of libel, and thus retains some vitality in state law.[67]

Furthermore, a similar application of the continuing violations doctrine has been entertained in the context of the Truth in Lending Act (TILA).[68] The general rule is that in cases involving closed end consumer credit transactions, the limitation period begins to run at a specific time—either at the time of execution of the credit contract or at the time the contract is performed. However, when the action is instituted more than one year after execution of the loan contract but less than one year after the actual extension of credit, some courts have found that the creditor's nondisclosure constitutes a continuing violation until the date when credit is extended.[69] In one such case, the District of Columbia District Court concluded that the continuing violations theory was applicable because the Act was intended to assist and inform the consumer,[70] the defendant's misconduct could best be characterized as

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[64]511 F.2d 875 (10th Cir. 1975).

[65]*Id.* at 878.

[66]*Id.*

[67]The so-called "multiple publication" rule is that each repetition of a libel constitutes a separate and distinct publication giving rise to a cause of action. It has been abandoned in many jurisdictions in favor of the "single-publication" rule, but is still followed by courts in Wisconsin and Montana. *See* Hartmann v. American News Co., 69 F. Supp. 736, 738 (D.C. Wis. 1947); Lewis v. Reader's Digest Ass'n, Inc., 512 P.2d 702, 703 (Mont. 1973).

[68]15 U.S.C. §§ 1601-44, 1661-65. The statutory limitations period provides, "Any action under this section may be brought in any United States District Court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640e. Closed end and open end credit transactions are defined *supra* note 50. *See generally* Annot., 36 A.L.R. Fed. 657 (1978) (time limitations under the TILA).

[69]Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130, 1137-39 (D.D.C. 1975), *aff'd in part*, 627 F.2d 1370, 1379-80 (D.C. Cir. 1980); Baker v. Shaker Savings Ass'n, Consumer Credit Guide (CCH) ¶ 98794 (D.C. Ohio 1974). *Compare* Goldman v. First National Bank, 532 F.2d 10 (7th Cir. 1976) (continuing violation not applicable to open end credit transactions).

[70]390 F. Supp. at 1139, 627 F.2d at 1378-79.

a continual deprivation of the plaintiffs' statutory rights,[71] and the harm to the plaintiffs continued through the duration of the defendant's violation.[72]

The rationale for continuing violations in the civil rights and TILA closed credit cases leads to the same result in the FCRA context. Like Title VII and the TILA, the FCRA provides a framework parallel to but separate from common law tort, and gives rise to different limitations considerations.

First, the FCRA is admittedly consumer-oriented,[73] yet was drafted to promote out-of-court settlement of credit disputes.[74] The purposes of the FCRA are thwarted when the consumer, who has jumped over all of the procedural hurdles of sections 1681g-1681l[75] and has still failed to correct the error being reported, is barred from a civil suit simply because his conciliatory efforts took too long. Failure neither to toll the statute of limitations during the negotiation period[76] nor to allow recovery for continuing violations rewards the credit reporting agency for ignoring the consumer's efforts until after the statute of limitations period has expired. Ideally, liability for these recurring inaccuracies will increase the credit industry's costs for such inaccuracies. These high costs may then encourage the implementation of reasonable procedures to eliminate

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[71]390 F. Supp. at 1139.

[72]*Id.* The *Postow* court found cases dealing with continuing violations in other areas of the law to be particularly persuasive evidence of the theory's validity in the TILA context, and cited the following analogies: Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 502 n.15 (1968) (continuing violation in private antitrust suit); Katz v. NLRB, 196 F.2d 411, 415 (9th Cir. 1952) (continuing unfair labor practice); Schokbeton Products Corp. v. Exposiac Industries, Inc., 308 F. Supp. 1366, 1367-68 (N.D. Ga. 1969) (continuing antitrust violation). *See Postow*, 627 F.2d at 1379-80.

[73]When speaking to the House of Representatives in support of the Conference Report on H.R. 15,073 containing the FCRA, Representative Sullivan stated, ". . .we assured the individual a means through court action to get to the bottom of any charge against him which he cannot refute without knowing where it came from. And we succeeded in making the reporting firms liable for damages for harm done by the firm's own negligence." 116 Cong. Rec. H10,049 (1970). *See, e.g.*, 15 U.S.C. § 1681(a)(4). One commentator writes that the Act

> . . . is a remedial statute whose purpose is to break through a mist of secrecy which surrounded many of the reports which determine whether an individual will attain sought-after benefits, and to provide effective recourse against errors in those reports. Such a remedial statute, in the absence of clear conflict with congressional intent, merits a liberal, rather than a painfully strict, construction. . . .

Note, *Judicial Construction*, *supra* note 5, at 485.

[74]15 U.S.C. §§ 1681g, 1681h, and 1681i, state the rules for disclosure of information to consumers and create a procedure through which the consumer can dispute a report's accuracy.

[75]*Id.*

[76]Blair & Maurer's work suggests that such tactics would likely result from credit reporting industry attempts to circumvent the symmetrical responsibilities imposed by the FCRA on consumer and reporting agency alike. Blair & Maurer, *supra* note 23, at 295-96.

these reporting errors in the first instance,[77] realizing the objectives of the FCRA.

Second, a continuing violation in a credit report is literally the present manifestation of a past wrong.[78] For example, if a credit reporting agency is shorthanded and has to forego checking the accuracy of its information, false, unverified reports might be typed onto a computer and issued to potential lenders. In the time between each issuance, the information would lie dormant in a computer bank. Here, the past wrong or violation is the "unreasonable procedure" of failing to verify reports, and this past wrong is manifested in the present each time the same erroneous information is reissued in a credit report.

Finally, enabling a consumer to sue for continuing violations does not alter the rules of qualified privilege[79] nor skew the burdens set out in the FCRA.[80] The standard of proof for unreasonable procedures under

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[77]The cost of erroneous reports, and the expense of avoiding error, are termed "primary accident costs" by G. CALABRESI, in THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). Primary costs should be borne by the "cheapest cost avoider," *id.* at 143-73, the party which can best assign the costs to the harm-causing activity, predict the costs most accurately, and insure against them most cheaply. *Id.* Concluding that in the credit reporting context, the reporting agency can best assume primary costs, one author writes

> . . . [t]he credit reporting bureau is thus able to assign the cost which the subject cannot, to evaluate the costs more accurately than the subject can, and to insure against them at lower cost. The bureau would be the cheapest avoider of primary costs, and imposing the cost on it would achieve the best general deterrence.

Note, *supra* note 2, at 1044-45.

[78]This is the argument the respondent made in United Air Lines v. Evans, 431 U.S. 553 (1977). There, the plaintiff argued in favor of adopting a continuing violation theory, but the United States Supreme Court stated that "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." 431 U.S. at 558 (emphasis in original).

[79]Traditionally, under defamation principles, plaintiffs had to prove actual malice to recover from consumer reporting agencies. Under this doctrine, agencies are given a "qualified privilege" from liability for reports which would otherwise be defamatory. *See* Smith, *Conditional Privilege for Mercantile Agencies* — Macintosh v. Dun, 14 COLUM. L. REV. 187 (1914); Harper, *Privileged Defamation*, 22 VA. L. REV. 642 (1936); Note, *supra* note 2, at 1049-54. Qualified privilege is a "conditional privilege . . . recognized in many cases where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it." W. PROSSER, THE LAW OF TORTS, at 789 (4th ed. 1971). A publication is considered privileged "when it is 'fairly made by a person in the discharge of some public or private duty, whether legal or moral . . . .' " *Id.* at 786 (footnote omitted). The privilege is generally accorded to mutual credit rating organizations because "such agencies perform a useful business service for the benefit of those who have a legitimate interest in obtaining the information, and who request the agency to obtain it for them." *Id.* at 790 (citations omitted). The privilege currently persists only to the extent that individual states still follow the rule. Maurer, *supra* note 23, at 101-05. *See, e.g.*, Tom Oleskeer's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill.2d 129, 137, 334 N.E.2d 160, 164 (1975).

[80]Courts generally assume that the burden of proving reasonableness of procedures followed falls on the plaintiff. *See* Hauser v. Equifax, 602 F.2d 811, 814-15 (8th Cir. 1979); Morris v. Credit Bureau, 563 F. Supp. 962, 968 (S.D. Ohio 1983); Alexander v. Moore & Assoc., Inc., 553 F. Supp. 948, 954 (D. Haw. 1982). *See also* Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act,* 47 S. CAL. L. REV. 1070, 1105-09 (1974).

the FCRA involves a balancing test. "[T]he court, in determining whether a violation of § 1681e(b) has occurred, would weigh the potential that the information will create a misleading impression against the availability of more accurate [or complete] information and the burden of providing such information."[81] This standard must be met, and the failure must be fairly attributable to negligence or malice before the plaintiff can recover for erroneous credit reports.[82] Allowing claims for continuing violations does not alter this standard but enables a consumer to pursue out-of-court remedies without forfeiting his or her right to relief under the FCRA.

IV. Conclusion

With the FCRA, Congress has attempted to balance the interests of consumers and consumer reporting agencies. The FCRA requires that specific information be made available to the subjects of credit reports and that agencies implement procedures for a consumer to dispute a report's accuracy. Furthermore, consumers have the opportunity to recover report-related damages by filing suit.

As a result of poor drafting, courts hearing complaints that involve the FCRA's statute of limitations must consider two important questions before arriving at a decision: (1) what event triggers the limitations period for negligent error; and (2) does the FCRA allow recovery for damages from a "continuing error?" Courts should attempt to resolve these questions by referring to the purposes of the FCRA and the common law underlying its provisions.

The law of defamation, which is analogous to the theory of the FCRA, suggests that receipt of the consumer report triggers the statute of limitations for negligent error.[83] Discovery of the error, or the date that damage arises, is unavailable as an accrual date under the terms of the Act. Other possibilities, such as the date of the report's issuance, or the time that unreasonable procedures were employed, are impractical and do not comport with the accepted legal doctrine governing defamatory publications.

There is room under the FCRA for the continuing violation theory. The continuing violations theory is not new to tort law, and the "multiple publication" theory used in defamation cases is a position to which many states subscribe. Lifting the continuing violations theory from other more popular contexts does no damage to the concept itself, nor does it skew the burdens set out in the FCRA. The FCRA shares a consumer orientation with other laws, and agency liability for continuing violations would probably minimize such violations.

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[81] 553 F.Supp. at 952. This standard was adopted by the Circuit Court of Appeals for the District of Columbia in Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 42 (D.C. Cir. 1984).

[82] 15 U.S.C. § 1681p.

[83] *See supra* text accompanying notes 46-49.